United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2412

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

KENNETH EUGENE OLIVER,

Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, HONORABLE JOHN T. CURTIN, DISTRICT JUDGE.

BRIEF FOR THE APPELLEE

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Preliminary Statement

On July 13, 1972, a complaint was filed with the United States District Court for the Western District of New York, charging the appellant, Kenneth Eugene Oliver, with the robbery of a bank in Buffalo, New York the day before. He was arrested by special agents of the Federal Bureau of Investigation in Detroit, Michigan and taken before the United States magistrate for the Eastern District of Michigan on the day the complaint was filed. He was released after posting 10 percent of the $30,000 bail set by the magistrate.

While on bail, Oliver was again arrested by special agents of the Federal Bureau of Investigation on October 13, 1972 and charged in the Western District of Michigan with another bank robbery, which had taken place a day earlier and resulted in the death of a Michigan State Trooper in Niles, Michigan. When federal authorities learned that the State of Michigan had also charged Oliver with murder and armed robbery, the federal charges in the Western District of Michigan were dismissed upon motion by the Government. Oliver was then detained in the custody of the Michigan authorities for extended pre-trial proceedings and trial. He was convicted of first degree murder, felony murder, and armed robbery, and, on June 25, 1973, was sentenced to life imprisonment.

While the Michigan state charges were pending, on December 5, 1972, a Federal Grand Jury sitting in the Western District of New York returned a three count Indictment (CR 1972-281) against Oliver, charging him with the July 12, 1972 Buffalo bank robbery, larceny, and assault. Shortly after his sentencing on the Michigan conviction, he was returned to Buffalo where he was arraigned on a superseding indictment (CR 1973-269) on July 30, 1973[1] (App. 13).

A suppression hearing was held before the Honorable John O. Henderson on October 9, 1973, to determine the admissibility of oral statements made by the defendant and items seized during a search of his residence and his wife's automobile. Subsequent to Judge Henderson's death on February 19, 1974, and prior to a decision on the motion to suppress, this case was referred to Judge Curtin for further proceedings. Oliver retained new counsel on June 17, 1974.

[1] The second indictment charged the same violation in almost identical language, although another individual was named as the victim of the robbery and assault.

On July 10, 1974, in a written opinion, the Court denied in all respects the defendant's motion to suppress (App. 23). Trial was subsequently set for September 10, 1974. On that day, immediately prior to the selection of the jury, counsel for the defendant orally moved for a dismissal of the indictment on the grounds that the defendant had not been provided a speedy trial (App. 73-89). Judge Curtin denied the motion and a jury was impanelled. However, at that point Oliver elected to waive his right to a trial by jury and chose to be tried by the Court. The evidence against the defendant consisted of two stipulations, containing the expected testimony of ten individuals, together with fifty-one exhibits (App. 27-38). The Court announced its findings of fact and conclusions of law on September 26, 1974, convicting Oliver on all three counts. Oliver was sentenced on October 25, 1974, to 15 years imprisonment on Count I, 10 years on Count II, and 15 years on Count III, all sentences to be concurrent one count with another, and with the Michigan life imprisonment term.

Statement of Facts

While driving to work at a Manufacturers and Traders Trust Company branch bank in Buffalo, New York on July 12, 1972, Lynn Otterman noticed a Negro male following her in a Camaro automobile. The driver of the Camaro followed her into the bank/plaza parking lot, pulled up along side her, and pointed a gun at her. He told her to get into his automobile and she did. With his gun continuously pointed at her, the Negro male drove to another area of the parking lot where he asked Miss Otterman a number of questions regarding the bank's security. He called Miss Otterman by name and referred to a number of other bank employees by their names. He then drove back to the bank, parked the car and entered the bank with Miss Otterman ahead of him at gun point (App. 34-35).

Once inside the bank, the individual pointed the gun at Donald Warren, the bank manager, and other bank employees. He said, "Okay, Don let's go" and motioned toward the bank vault. He told all the employees to get into the vault. Carrying a black attache case, he told Mr. Warren and the other employees to open a number of drawers in the vault, remove the money, and fill his black attache case. At one point, he told Mr. Warren that "You better hurry up, or your wife's going to be a widow". Not satisfied with the speed of the bank employees, he said, "Hurry up, you are moving too fuckin' slow". He addressed at least five bank employees by their names and continuously held the gun pointed at them. After the employees had filled both the attache case and a white bag he was carrying, the man told all the employees to face the back of the vault and said, "I know where you live. I will be seeing you." He closed the vault door and left the bank. The bank robber was described by employees as a Negro male, apparently in his mid-30's, about 5'10" or 6' with a heavy build. He was wearing what appeared to be a fake plastic beard. His Camaro automobile was described as beige or light tan in color with a black vinyl top (App. 36-38).

After hearing news media accounts of the bank robbery, Eleanor Whitmer and George Weigold contacted the Federal Bureau of Investigation. Mrs. Witmer told agents that she had noticed a grey Camaro with a black vinyl top, driven by a Negro male, drive by her house on a number of occasions on the day before the bank robbery. At one point, the driver parked the automobile in front of her house and remained there for over an hour. Her residence was six houses from Donald Warren's residence, but several miles from the bank that had been robbed. Her suspicions aroused, she made note of his license number, Michigan

plate LGX-642 (Exhibit 52, pp. 7-8). Mr. Weigold, an employee of a department store in the same plaza as the Manufacturers and Traders Trust Company bank, told the F.B.I. that he had noticed several days earlier a grey 1970 Camaro parked in the plaza parking lot for approximately two hours before the business establishments opened for the day. A Negro male was the sole occupant of the automobile. Mr. Weigold also took note of the license plate number, Michigan plate LGX-642 (Ex. 52, p. 8).

On the afternoon of the robbery, the Buffalo F.B.I. office sent a teletype to the Detroit F.B.I. office, advising that a Buffalo bank had been robbed by a male Negro, approximately 6′ tall with a heavy build. The Buffalo office further advised that a Camaro with Michigan license plate LGX-642 had been seen in the vicinity of the bank a number of days prior to the robbery. Special Agent Richard Farley of the Detroit field office then contacted the Michigan motor vehicle authorities and learned that a 1970 two-door Chevrolet with Michigan plate number LGX-642 was registered to Linda C. Oliver who resided at 1042 Stafford Place in Detroit, Michigan. That afternoon, Agent Farley spot checked the 1042 Stafford Place address a number of time, looking for the vehicle without success (Government's Appendix, 78, 79).

He returned the next morning with other agents and knocked on the door. Linda Oliver answered the knock and invited the agents into the house. After the agents explained the purpose of the visit, she consented both orally and in writing to the search of her automobile, a silver Camaro, and the premises at 1042 Stafford Place (Government's Appendix, 75). When they found $1,055 in the glove compartment of the car, together with money wrappers with the words "Manufacturers and Traders Trust Company, Buffalo, New York" on them, they returned to the

house where Mrs. Oliver admitted that her husband Kenneth Oliver was home and upstairs with a gun (G. App. 85-86).

Farley and the other agents began climbing the staircase and called out to Oliver, telling him that they were F.B.I. agents and that Oliver was under arrest. The only response Farley heard was the sound of an automatic handgun being cocked. After approximately one minute, Oliver emerged and surrendered. He was placed under arrest and advised of his rights by Agent Lawrence Bonney (G. App. 87-90). When the agents told Oliver that the money had been recovered from his wife's automobile and that the automobile had been identified as being in the vicinity of the robbery sometime prior to July 12, 1972, Oliver then orally admitted robbing the bank. He told the agents that some of the bank money was in his black attache case in his basement. He accompanied agents to the basement where $30,546.09 was recovered from the attache case, together with a number of Manufacturers and Traders Trust Company bank wrappers and deposit slips, a Buffalo street map, a fake mustache and wig (G. App. 92-98). Oliver said that he had used a .45 caliber automatic gun in the course of the robbery which could be found in his garage. It was recovered by an F.B.I. agent who found that it was not loaded although it did contain a clip (G. App. 99-100). A number of other items were seized by the agents, including $4,518 found on top of Oliver's dresser in the room where he was placed under arrest, and a Buffalo street map cover which contained the names and addresses of several Manufacturers and Traders Trust Company employees, together with descriptions and license plate numbers of the vehicles they drove (G. App. 93-95). Oliver was then taken to the F.B.I. office and later that day to the United States Magistrate where bail was set in the amount of $30,000. On the next day, July 14, 1972, he posted ten percent of that amount and was released.

Questions Presented

1. Was the appellant provided a speedy trial within the terms of the Plan for the Prompt Disposition of Criminal Cases?

2. Does the appellant have standing to contest the admissibility of those items seized from his wife's automobile?

3. Did Linda Oliver voluntarily consent to the search of her automobile and residence?

4. Was the evidence sufficient to support the finding that the appellant was guilty of an offense under Section 2113(d)?

5. Was the evidence sufficient to support the finding that the appellant was guilty of an offense under Section 2113(a)?

ARGUMENT

POINT I

The appellant was provided a speedy trial within the terms of the Plan for the Prompt Disposition of Criminal Cases.

Pursuant to its authority under Title 28, United States Code, Section 332, the Circuit Counsel of the Second Circuit promulgated the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases on January 5, 1971. At the same time it issued a *Statement of the Circuit Counsel to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases* in which it explained the purpose behind the so-called speedy trial rules:

> "The public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required for some good reason. The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded." Title 28, USCA, Rules (1974 Supp., p. 79)

Thereafter, Rule 50 of the Federal Rules of Criminal Procedure was amended to add subsection (b) which required each district court to prepare a plan for the prompt disposition of criminal cases in its district. The Plan of the District Court for the Western District of New York was thereafter promulgated, effective on April 1, 1973. Its terms were substantially the same as those found in the earlier Second Circuit rules (G. App. 1-7). Rule 4 provides that:

> "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six month period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance . . .".

Shortly after Oliver's conviction in Michigan and return to the Western District of New York, on August 14, 1973,

his counsel moved for a dismissal of the indictment, alleging that the defendant had not been provided a speedy trial. The government opposed the motion in a response filed with the Court on August 30, 1973, which included affidavits of prosecutors in the Eastern and Western Districts of Michigan, the Western District of New York, and the State of Michigan, which explained and accounted for the time that had elapsed between Oliver's arrest on July 12, 1972, and the filing of the Government's response on August 30, 1973 (G. App. 8-33). The government advised the Court of its readiness for trial on September 1, 1973, by forwarding the General Case Report (Form 74) to Judge Henderson, the trial judge (G. App. 74). The government's readiness was again communicated to Court and counsel on June 25, 1974 (G. App. 37).

After reviewing the material submitted to him, Oliver's original counsel reported back to the Court on October 1, 1973, that "We have resolved the speedy trial issue in this case. We are going to at this time abandon that motion." (G. App. 59) No further written motions were made by either of the appellant's two attorneys. Indeed, on July 25, 1974, Oliver's counsel advised the Court that he had no further motions to make (G. App. 37). However, on September 10, 1974, the day of trial, appellant's attorney then orally moved for dismissal of the indictment, alleging that the government had failed to comply with the Plan for Achieving Prompt Disposition of Criminal Cases. No written material or affidavits were submitted to the Court in support of the motion. Moreover, Oliver's counsel did not dispute or contest any of the facts relating to the chronology of events in this case, which had been set forth in the affidavits of the prosecutors, submitted to the Court on August 30, 1973. After hearing the attorney for the government review those facts, the Court denied the motion to dismiss (App. 89).

The Plan does not require that every defendant be tried within six months from the date of his arrest. Instead, it attempts to "minimize *undue* delay" (emphasis supplied) in the disposition of criminal cases. In drafting the Plan, the Court recognized that there will be a number of situations where both the government and defendant will not be ready for trial within the six month period. For that reason, Rule 5 of the Plan specifies that certain periods shall be excluded from the six months within which the government must be ready for trial. The existence of any one of these conditions will toll the six month period.

Set forth below is a summary of events and proceedings pertaining to Kenneth Oliver from the date of his arrest on July 12, 1972, until the date of trial on September 10, 1974, together with an assessment as to whether the period may be properly excluded, pursuant to Rule 5, from the time within which the Government must be ready for trial:

A. *July 13, 1972—October 12, 1972.*

Sometime after Oliver's release on bail on July 14, 1972, and prior to the scheduled removal hearing date of July 21, 1972, his Detroit attorney told Assistant United States Attorney Richard L. Delonis of the Eastern District of Michigan that Oliver wanted to dispose of the Buffalo bank robbery charges by way of a Rule 20 plea in Detroit. Furthermore, Oliver was willing to lend some assistance to the Government in its investigation of narcotics trafficking in the Detroit area. In order to gain some time to show his good faith in cooperating with the federal authorities, Oliver's Detroit attorney requested adjournments of the removal hearing to August 2, August 29, September 29 and October 30, 1972 (G. App. 8, 10). Oliver's requests were granted by the United States Magistrate for the Eastern District of Michigan and were stated upon the

record of proceedings held by the Magistrate (G. App. 10). They were further evidenced by the Detroit attorney's letter to Mr. Delonis, in which the Detroit attorney sought to verify that Oliver was in fact assisting in some law enforcement efforts (G. App. 12).

Rule 5(b) of the Plan provides that there may be excluded from the time which the Government must be ready for trial any:

> "periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record." (G. App. 3)

Clearly, the entire period from July 13, 1972, through October 30, 1972, is one which may be excluded from the six month period pursuant to Rule 5(b) of the Plan. The several adjournments were at the request of the defendant or his counsel and were stated both in writing and upon the Magistrate's record of proceedings.

B. *October 13, 1972—June 25, 1973.*

From the date of Oliver's arrest on the Niles, Michigan bank robbery and murder charges on October 13, 1972, and continuing through June 25, 1973, Oliver was in the custody of Michigan authorities pending trial on their charges. According to the affidavit of prosecuting attorney Ronald J. Taylor and the record of proceedings involving Oliver in Berrien County, Michigan, Oliver made several pre-trial motions including motions to set bail, to suppress physical evidence seized from and oral statements made by him, to quash the information, for the substitution of attorneys, for a psychiatric examination, for a change of venue, for discovery, and for the production of certain witnesses. One or more motions were pending before the Michigan state court at all times from January 16, 1973, until June 5,

1973, the first day of the Michigan trial (G. App. 25-33). Hearings on the various motions comprised at least sixteen days during this period, including one hearing to determine the defendant's competency. At his own request, Oliver was committed to the Forensic Center in Michigan for approximately sixty days to determine his competency to stand trial. After preparation of a variety of motions presented on behalf of the defendant, the original defense attorney was excused from the case and another attorney substituted for him, resulting in additional delay to allow the new attorney to familiarize himself with the case and to prepare additional motions. Trial was held from June 5, 1973, through June 14, 1973. Oliver was sentenced to life imprisonment on June 25, 1973.

On several occasions during this period, the United States Attorney for the Western District of New York made efforts to ascertain Oliver's status and whether he could be brought back to Buffalo to stand trial on the original indictment returned by the Buffalo Grand Jury on December 5, 1972. At one point, upon application by the Government, the United States District Court signed a writ of *habeas corpus ad prosequendum* on March 21, 1973, which directed the Michigan authorities to produce Oliver in Buffalo, New York on March 28, 1973 (G. App. 34). However, prosecuting attorney Ronald Taylor voiced his objection to the release of Oliver to the federal authorities, since Oliver's presence in Michigan was essential to the expeditious disposition of the charges pending against him there (G. App. 25). Additionally, the defendant was at that time undergoing psychiatric examinations to determine his competency to stand trial, and any delay at that point would hamper the defense in the preparation of its case. For those reasons, Oliver remained in Michigan.

The entire period from October 13, 1972 through June 25, 1973 may be excluded pursuant to Rule 5(a) of the Plan which allows exclusion of any "period of delay which proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are *sub judice*." (G. App. 3) While the appellant now suggests that the phrase "trial of other charges" should be restricted to only those days spent in actual trial in other cases, he ignores the provision in Rule 5(a) which excludes periods of delay which "proceedings concerning the defendant are pending". While this phrase is no where defined by the drafters of the rules, this court should adopt a construction which serves the public interest in accordance with the purpose of both the Plan and the earlier Second Circuit Rules regarding the prompt disposition of criminal cases.

The entire period may also be excluded pursuant to Rule 5(f) as a

> "period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial." (G. App. 4)

Oliver was never forgotten by the United States Attorney for the Western District of New York. An indictment was returned against Oliver in Buffalo on December 5, 1972, while charges were still pending against him in Michigan. At one point, the United States Attorney sought Oliver's presence in Buffalo by means of a writ of *habeas corpus ad prosequendum*. However, upon good cause being shown by the Michigan prosecutors, the

United States Attorney declined to insist upon the defendant's presence. Nevertheless, within fifteen days of Oliver's sentencing in Michigan, the United States Attorney obtained a second writ, directing the Michigan authorities to produce Oliver for trial in Buffalo.

C. *June 26, 1973—July 29, 1973.*

This period of delay is also excludable pursuant to Rule 5(f) of the Plan since it resulted solely from the detention of the defendant by Michigan authorities and since the United States Attorney for the Western District of New York acted with diligence in obtaining the writ of *habeas corpus ad prosequendum.*

D. *July 30, 1973—August 13, 1973.*

Without counsel at his arraignment on July 30, 1973, Oliver requested that the court allow him a period of time to determine whether his Michigan attorney would represent him on the Buffalo charges (G. App. 44, 45). Eventually, Oliver claimed indigency and requested the court appoint an attorney to represent him (G. App. 51, 52). He was arraigned once more, with counsel, on August 13, 1973.

Pursuant to Rule 5(g) of the plan, "the period during which the defendant is without counsel for reasons other than the failure of the Court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel" may be properly excluded from the six month period (G. App. 4, 5). Clearly, these fourteen days fall within the terms of Rule 5(g) of the Plan. This period is also covered by the exclusion in 5(a) of the Plan as a period during which proceedings concerning the defendant were pending before the Court.

E. *August 13, 1973—July 10, 1974.*

At the time of Oliver's arraignment, his attorney advised the Court that he wished to submit a number of motions in this case. Motions were filed by the defendant on August 14, 1973, which included a request for a hearing to determine whether certain oral statements made by, and evidence seized from, the defendant should be suppressed. The suppression hearing was held before the late Judge Henderson on October 9, 1973. At the Court's direction, the government submitted a menorandum of law to the Court on November 6, 1973. However, the defendant declined to submit a brief in opposition. The defendant's motion to suppress was pending before the Court at the time of Judge Henderson's death on February 19, 1974. Thereafter, the matter was referred to the Honorable John T. Curtin who afforded the defendant the opportunity to submit any additional written material or motions in the case. No additional motions were filed. On July 10, 1974, Judge Curtin denied the defendant's motion to suppress (G. App. 23-26).

However, prior to Judge Curtin's decision, Oliver advised the Court on May 1, 1974, that he wanted to discharge his assigned attorney and retain another attorney (G. App. 64-69). On June 17, 1974, the Court was advised that Oliver had retained George Doyle as his new counsel (G. App. 37).

Since the Court continuously had pre-trial motions by the defendant under consideration from August 13, 1973 through July 10, 1974, this period of delay may be excluded pursuant to Rule 5(a) of the Plan. Additionally, the period from May 1, 1974, through June 17, 1974, may be excluded as a period during which the defendant was without counsel, pursuant to Rule 5(g) of the Plan.

F. *July 11, 1974—September 10, 1974.*

The government announced its readiness for trial prior to the decision on defendant's suppression motion. Accordingly, the Plan imposes no burden upon the government to explain any delay from its announcement of readiness. However, in order to preclude any claim that the length of delay until trial of this case violation any statutory or constitutional right of the appellant, the following explanation is offered for the delay after the court's ruling on the suppression motion. As Judge Curtin stated on the day of trial, he tried to bring this case to trial as soon as possible after he decided the suppression motion on July 10, 1974. However, he was about to begin a trial on July 15, 1974 which ultimately consumed approximately three and one half weeks. Thereafter, he took a short vacation and scheduled the Oliver case to be the first tried upon his return (App. 80-82). Due to Judge Henderson's death earlier in the year, Judge Curtin was the only remaining District Court Judge in Buffalo.

As this Court has noted, its own speedy trial rules and the subsequent Plans promulgated by the various districts

> "were not intended to straight-jacket the administration of criminal justice in the Federal Courts, nor were they designed to place obstacles in the path of legitimate law enforcement efforts and thus thwart the compelling public interest in criminal prosecutions". *United States v. Pierro*, 478 F. 2d 386, 389 (2d Cir. 1973).

This Court has earlier recognized that "the public interest in prompt adjudication must be balanced against competing interests". *United States v. Rollins*, 487 F. 2d 409, 414 (2d Cir. 1973). And, more recently, this Court observed that "the Plan was not established primarily to safeguard

defendants' rights. Rather the Plan, and the Second Circuit before it, were to serve the public interest in the prompt adjudication of criminal cases. . . It is not the defendant's personal interest being defended by the Plan, but rather the public's whose interest is both in convicting criminals and in upholding the Plan. . ." *United States v. Flores*, Docket No. 74-1186 (2d Cir. decided August 7, 1974), p. 5152, footnote 4.

It is submitted that the overriding public interest in this case was to try Oliver first on the more serious charges in Michigan. However, if the Court accepts his argument that the decision to delay the Buffalo trial resulted in non-compliance with the Plan, the logical result of such a holding would be to allow defendants released on bail on one offense to commit any number of offenses with the assurance that their "rights" would protect them for prosecution. The court is urged to reject any such anomalous construction of a Plan which seeks to promote a respect for the process of law enforcement.

POINT II

The appellant lacks standing to contest the admissibility of those items seized from his wife's automobile.

Before going to 1042 Stafford Place, the F.B.I. agents checked with the Michigan authorities and determined that the Chevrolet automobile with Michigan plate LGX-642 was registered to Linda C. Oliver (G. App. 78). Mrs. Oliver readily acknowledeged that she owned the automobile (G. App. 108). At no time during any of these proceedings has the appellant ever claimed that he owned or had any interest whatever in the vehicle.

Rule 41(e) of the Federal Rules of Criminal Procedure provides that "a person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized." As the Supreme Court has held, "in order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom a search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones v. United States*, 362 U.S. 257, 261 (1960). The Fourth Amendment guarantees against unreasonable searches and seizures are "personal rights, [which] may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389 (1968). Fourth Amendment rights may not be vicariously asserted "to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment". *Alderman v. United States*, 394 U.S. 165, 174 (1969).

More recently, the Supreme Court summarized the law on standing as follows:

> "There is no standing to contest a search and seizure where, as here, the defendants:
>
> (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. United States*, 411 U.S. 223, 229 (1973).

Oliver was not in the automobile at the time it was searched, nor did he ever claim a possessory or proprietary interest in either the automobile or the items contained therein. The offenses with which Oliver was charged do not include, as essential elements, the possession of the stolen money. Since Oliver lacks standing to contest the search of the automobile and the seizure of the money and bank wrappers from the glove compartment, the District Court properly admitted these items into evidence against the defendant. *United States v. Masterson*, 383 F.2d 610 (2nd Cir. 1967).

POINT III

Linda Oliver voluntarily consented to the search of her automobile and residence.

Very recently, this Court has reaffirmed the rule that "consent to a search by one with access to the area searched, and either common authority over it, a substantial interest in it or permission to exercise that access, express or implied, alone validates the search." *United States v. Gradowski*, 502 F.2d 563, 564 (2d Cir. 1974), *United States v. Pravato*, Number 74-1760 (2d Cir. November 11, 1974), slip op. 323. More specifically, "the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant, permitting evidence discovered in the search to be used against him at a criminal trial." *United States v. Matlock*, 415 U.S. 164, 169 (1974). However, the Government must establish by a preponderance of the evidence that consent to the search was freely and voluntarily given. *United States v. Fernandez*, 456 F.2d 638 (2d Cir. 1972). *United*

States v. Boston, Docket No. 74-1451 (2d Cir., decided December 12, 1974) slip op. 5949. In determining whether the consent is voluntary, the Court must look to the "totality of the circumstances." *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973).

Upon their arrival at 1042 Stafford Place, the F.B.I. agents identified themselves to Mrs. Oliver, showed her their credentials, and told her that they wanted to speak to her regarding a bank robbery the previous day in Buffalo, New York. She said, "Come in" (G. App. 80). The two agents were dressed in business suits and displayed no weapons (G. App. 101-102). When they learned that a Chevrolet automobile with Michigan license plate number LGX-642 was in the garage, they asked Mrs. Oliver if she would consent to a search of the vehicle and the residence. She said she would, that she had done nothing wrong and that the agents would find nothing in the automobile involving her or anyone else (G. App. 81, 103). Another agent then wrote a consent to search statement, presented it to Mrs. Oliver, and asked her to read it. She did so and, in reply to a question by one of the agents, said that she understood her rights. When asked if the agents still had her consent, she said yes and signed the written consent in their presence (G. App. 110). The agents then went out to the automobile and found the $1,055 in the glove compartment, together with the Buffalo bank's wrappers. They returned to the house where Mrs. Oliver then admitted that Kenneth Oliver was upstairs and armed with a gun (G. App. 85-86).

Since neither Oliver nor his wife testified at the suppression hearing, the "totality of circumstances" must be gleaned from the testimony of the three FBI agents who

did testify. They all said that Mrs. Oliver was asked for her consent and permission to search the vehicle and premises, and that her consent was reduced to writing in a statement which she read and acknowledged understanding. Her permission was given unequivocally and without hesitation (G. App. 111), with full knowledge that "I have a right not to have a search made of my house" (G. App. 75). There is no evidence whatever of any unwillingness by Mrs. Oliver, despite the several opportunities she had to resist or refuse. The agents practiced no deception or coercion, nor did they make any promises or predictions to Mrs. Oliver regarding whether they might obtain a search warrant if she refused to consent. See *United States v. Faruolo*, Docket No. 74-1350 (2d Cir., decided Oct. 29, 1974), slip op. 5825. Instead, they forthrightly told her the purpose of their visit and what they wanted to do. While she "need not have had a positive desire that the search be conducted in order for [her] consent to have been voluntary and effective", *United States v. Thompson*, 356 F.2d 216, 220 (2d Cir. 1965), the testimony of the agents shows that Mrs. Oliver willingly gave her consent to the search.

Appellant's argument that the agents had sufficient evidence to obtain a search warrant prior to their arrival at the Oliver residence is unsupported by the evidence. The only information they had at that time was that (1) a bank robbery had occurred the previous day in Buffalo; (2) the suspect was a Negro male; and (3) an automobile driven by a Negro male and bearing license plates issued to Linda Oliver was seen in the vicinity of the bank several days prior to the robbery. These facts, without more, are clearly insufficient for the issuance of a warrant. *Brinegar v. United States*, 338 U.S. 160 (1949).

POINT IV

The evidence was sufficient to support the finding that the appellant was guilty of an offense under Section 2113(d).

The stipulated testimony of both Lynn Otterman and Donald Warren establishes that the bank robber brandished a handgun continuously throughout the course of the robbery. He pointed it at Mr. Warren and the other bank employees when directing them to enter the vault and remove the money. Furthermore, at several points he commanded the employees to move faster and, on one occasion, he directly threatened Mr. Warren with death if he failed to comply (App. 37).

The fact-finder may properly infer that a gun used during the commission of a bank robbery was loaded. *United States v. Marshall*, 427 F.2d 434 (2d Cir. 1970). "The act of threatening others with a gun is tantamount to saying that the gun is loaded and that the gun wielder will shoot unless his commands are obeyed." at 437. Judge Curtin chose to draw this inference from the evidence before him and concluded that Mr. Warren's life was put in jeopardy by Oliver's actions. Appellant's argument that the gun was not loaded failed to persuade the court at trial, and he now offers no reason for this court to substitute its findings for those of the district court.

POINT V

The evidence was sufficient to support the finding that the appellant was guilty of an offense under Section 2113(a).

This Court recently held that the use of a handgun during the course of a bank robbery was ample evidence of the "force" required by Section 2113(a), and pointing the gun at the employees was sufficient to prove the "violence" contemplated by the statute. *United States v. Pravato*, 505 F.2d 703 (1974). Therefore, the district court's finding that Oliver's actions constituted a violation of Section 2113(a) was supported by the stipulated testimony of Miss Otterman, Mr. Warren, and the admission by the appellant that he used the .45 caliber automatic during the course of the robbery (G. App. 99).

Conclusion

It is respectfully submitted that for the foregoing reasons the judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Kenneth E. Oliver
Docket No. 74-2412

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 4 day of February, 1975 I mailed 3 copies of a printed Brief and Appendix in the above case, in a sealed, postpaid wrapper, to:

George P. Doyle, Esq.

Ellicott Square Building

Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U. S. Attorney

502 U. S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

4 day of February, 1975

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1975